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In The

Supreme Court of the United States

October Term, 1991

INDIAN CHILD WELFARE COORDINATOR
OF THE JUVENILE COURT OF THE
CHEYENNE RIVER SIOUX TRIBE, ET AL.

v. *Petitioners,*

CHESTER COUNTY DEPARTMENT
OF SOCIAL SERVICES, ET AL.

Respondents.

Petition For Writ Of Certiorari
To The Supreme Court of South Carolina

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*Scott B. McElroy
Mark C. Van Norman
*Counsel of Record
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021

Steven C. Emery
Tribal Attorney
Cheyenne River Sioux Tribe
P.O. Box 590
Eagle Butte, South Dakota 57625
(605) 964-4155

Counsel for Petitioner, Indian Child Welfare Coordinator of the Juvenile Court of the Cheyenne River Sioux Tribe

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OR CALL COLLECT (402) 342-2831

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INTRODUCTION

The petition for a writ of certiorari to the Supreme Court of South Carolina was timely filed on March 11, 1991, and the guardian ad litem's brief in opposition to the petition was received April 15, 1991. Ordinarily, it would not be necessary to file a reply brief, but the guardian raises several procedural and substantive points that call for rebuttal.[1]

1. Petitioner Has Satisfied the Requirements of Rule 10

The guardian ad litem argues that petitioners have not met the requirements of United States Supreme Court Rule 10, which provides, in pertinent part, that a writ of certiorari may be granted when "a state court . . . has decided a federal question in a way that conflicts with applicable decisions of this Court."[2] The guardian is

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[1] The guardian has submitted an affidavit which purports to record the testimony of two of the Indian children. Respondent's Brief, App. 1-2. This affidavit is both hearsay and outside the record and is entitled to no consideration. The affidavit does, however, reflect the close alliance of interests between the guardian and the non-Indian foster parents. Petitioner's Brief at 4-5 n.2.

[2] Respondent also argues that the Petitioner has not complied with Supreme Court Rule 14(h). The Petitioner has, however, complied with the rule. The Petitioner's Statement of the Case notes that the Tribe has sought transfer of this case to tribal court since June, 1984, and the essential controversy is the "persistent refusal of the South Carolina appellate courts to recognize the congressional mandate of the Indian Child Welfare Act of 1978" and transfer the case to tribal court. Petitioner's Brief at 2-3.

clearly mistaken. In this case, the Supreme Court of South Carolina disregarded this Court's decision in *Mississippi Band of Choctaws v. Holyfield*, 490 U.S. 30 (1989), without so much as a reference.

a. The State Supreme Court's Decision is Directly Contrary to the Congressional Mandate of the ICWA and the Teaching of *Holyfield*

Title 25 U.S.C. § 1911(b) *mandates* transfer of jurisdiction from state court to tribal court, absent "good cause" to the contrary, to prevent "the wholesale separation of Indian children from their families" and communities by state courts and state agencies. House Report No. 95-1386, p. 9 (1978), *reprinted* in 1978 U.S. Code Cong. & Admin. News, pp. 7530, 7544 (hereinafter "House Report"); *Holyfield*, *supra* at 45 n.18. In essence, the Respondent argues that, because the term "good cause" is not expressly defined by the ICWA, state courts are free to define that term "flexibly" without reference to the overriding purposes of the Act.[3] That is flatly wrong.

The views of the House Committee on Interior and Insular Affairs, and Chairman Udall, the principal sponsor of the bill, are the most authoritative guides to the

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[3] The guardian ad litem also argues that the rights of the children as Indians, their Indian mother and the tribe under 25 U.S.C. §§ 1912 and 15, need not be considered until the parental termination proceeding, Respondent's Brief at 18, yet this argument runs directly against the language of the House Report, p. 21. Moreover, the guardian ignores the fact that if the tribe were given an opportunity to try to rehabilitate the parents and reunite the family, there might be no need for the termination hearing. *See* Petitioner's Brief at 21.

construction of the statute. *Rice v. Rehner*, 463 U.S. 713, 728 (1983); *Kennerly v. District Court*, 400 U.S. 423, 429 n.5 (1971). The House Report's section-by-section analysis explains that 25 U.S.C. § 1911(b) *must* be applied to fully protect the federal rights which Congress created to protect Indian families and tribes:

> This section is intended to permit a State court to apply a modified doctrine of forum non conveniens, in appropriate cases, *to insure that the rights of the child as an Indian, the Indian parents or custodians, and the tribe are fully protected.*

House Report, p. 21 (emphasis added). In carrying out the congressional mandate to fully protect the rights of the children as Indians, the Indian parent and the tribe, under 25 U.S.C. § 1911(b), state courts must consider which forum is better able to protect those rights by: a) making active efforts to rehabilitate the parents and reunite the family, 25 U.S.C. § 1912(d)[4]; b) providing for Indian foster or adoptive placement, *see* 25 U.S.C. § 1915;

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[4] The guardian ad litem admits that after the family court made findings of sexual abuse at a preliminary hearing on foster placement in February, 1986, state social services stopped all efforts to rehabilitate the parents and reunite the family. Respondent's Brief at 16. And, the state supreme court failed to even consider that, based on the mother's residence on the Reservation in South Dakota, only the tribal court could hope to successfully rehabilitate her. Petitioner's Brief at 20 (Tribe's expert has a 90% success rate in treating abusive parents).

and c) conducting Indian child custody proceedings in accordance with tribal social and cultural standards.[5]

Nevertheless, the Supreme Court of South Carolina ignored the presumption in favor of tribal court jurisdiction and the congressional mandate to fully protect the rights of the children as Indians, the rights of their Indian mother and their tribe. Instead, upon a cold record, the state court reversed the family court and entered its own findings *de novo*: 1) *"The foster parents . . . would like to adopt"* the Indian children; 2) To overcome the Indian placement preference of 25 U.S.C. § 1915(a), "the *foster parents* will inevitably utilize the testimony of neighbors, friends, family, social workers, and psychologists to show their *fitness as parents*, to show how well the children have adjusted to their *foster homes*, and to show the impact on the children of removing them from their *foster homes*; and 3) "Since the Tribe does not have to overcome the

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[5] Another recent state supreme court decision similarly ignores Congress's direction to "fully protect" the rights of the Indian child, Indian parent and Indian tribe. *In Matter of T.S.*, 801 P.2d 77 (Mont. 1990), the Supreme Court of Montana ignored the Indian child's connection to the native community and the tribe's connection to the child in favor of "a best interests of the child" test which gave preference to the maintenance of an existing foster placement.

According to the family court, the child was, by the time of the trial court's decision, "adapted to her home now, and the foster family desires to adopt her as soon as possible." *King Island Native Community v. Montana*, Petition for Certiorari filed February, 1991, at 6. *In Matter of T.S., supra*, provides another example of a state court making the interests of temporary foster parents paramount to the interests of the natural Indian parent, the child and the tribe.

preference, it seems likely that fewer witnesses from South Dakota will be involved." Petitioner's App. at 6-7 (emphasis added). This rationale would lead to the same conclusion in *every* case involving non-Indian foster parents: denial of tribal court jurisdiction.

b. The State Supreme Court Reversed the Policy of the ICWA

In light of the congressional purpose animating the ICWA, the state supreme court's extreme solicitude for the interests of the non-Indian foster parents and concomitant derogation of the rights of the children as Indians, their Indian mother and the tribe are egregious violations of ICWA and this Court's decision in *Holyfield*. The *Holyfield* Court explained:

> The ICWA "[s]eeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." It does so by establishing "a Federal policy that, where possible, an Indian child should remain in the Indian community," and by making sure that Indian child welfare determinations are not based on a "white, middle-class standard which, in many cases, forecloses placement with [an] Indian family."

490 U.S. at 36 (citations omitted). The "receptivity of the non-Indian forum to non-Indian placement of an Indian child is precisely one of the evils at which the ICWA was aimed." *Holyfield, supra* at 45 n.18, quoting *In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986).

Yet, despite this clear statement, the state supreme court changed the rights of the children as Indians and

the rights of their tribe – which Congress had granted expressly to preserve their cultural and communal ties – into an almost insurmountable barrier to presumptive tribal court jurisdiction. Unquestionably, the result was that non-Indian foster placements were preserved at the expense of these Indian children's ties to their family, their community and their tribe. If allowed to stand, the state court's decision will render the heart of the ICWA, 25 U.S.C. § 1911(b), a dead letter.

CONCLUSION

The Court should grant the petition for certiorari because the state supreme court's decision directly conflicts with this Court's decision in *Holyfield, supra,* and casts a pall over the most fundamental Indian interests – "the future and integrity of Indian tribes and Indian families." *Holyfield, supra* at 45 n.18, quoting Chairman Udall.

For these reasons, the Petitioner respectfully requests this Court to grant the writ of certiorari.

Dated: April 22, 1991

Respectfully submitted,

Scott B. McElroy
Mark C. Van Norman
Greene, Meyer & McElroy, P.C.
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021

Steven C. Emery
Tribal Attorney
Cheyenne River Sioux Tribe
P. O. Box 590
Eagle Butte, South Dakota 57625
(605) 964-4155

Counsel for Petitioner, Indian Child Welfare Coordinator of the Juvenile Court of the Cheyenne River Sioux Tribe